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GLOBAL UPLINE SDN BHD v. KERAJAAN MALAYSIA

HIGH COURT MALAYA, KUALA LUMPUR
S NANTHA BALAN JC
[SUIT NO: 21NCVC-257-12-2012]
29 MAY 2015

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CIVIL PROCEDURE: *Government proceedings – Monetary judgment against government – Application to set aside order of suspension – Application for certificate under s. 33(1) Government Proceedings Act 1956 ('GPA') – Deputy Registrar allowed issuance of certificate but suspended payment of judgment debt pending disposal of appeal against judgment – Whether proper to suspend judgment debt under proviso to s. 33(3) of GPA – Whether government must show existence of special circumstances to warrant suspension of judgment debt – Whether such circumstances must be deposed in affidavit – Whether suspension of judgment debt by Deputy Registrar was right exercise of discretion*

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CIVIL PROCEDURE: *Execution – Judgment – Monetary judgment against government – Application to set aside order of suspension – Application for certificate under s. 33(1) Government Proceedings Act 1956 ('GPA') – Deputy Registrar allowed issuance of certificate but suspended payment of judgment debt pending disposal of government's appeal against judgment – Whether proper to suspend judgment debt under proviso to s. 33(3) of GPA – Whether government must show existence of special circumstances to warrant suspension of judgment debt – Whether such circumstances must be deposed in affidavit – Whether suspension of judgment debt by Deputy Registrar was right exercise of discretion*

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Enclosure 55 was the plaintiff's application for a certificate to be issued to the plaintiff under s. 33 of the Government Proceedings Act 1956 ('GPA') in respect of a judgment debt owed by the Government of Malaysia ('the defendant') pursuant to a judgment of the High Court dated 9 December 2014. The Deputy Registrar had allowed the issuance of the certificate with the direction that the payment of the judgment debt be suspended pursuant to s. 33(3) of the GPA pending the disposal of the defendant's appeal to the Court of Appeal against the judgment and further ordered that there be no order as to costs in respect of encl. 55. Hence, in the present appeal *vide* encl. 61, the plaintiff prayed for an order that the suspension be set aside and for costs of encl. 55 be allowed. The plaintiff argued that the court's power to order suspension of payment under the proviso to s. 33(3) of the GPA was discretionary and that the court must exercise its discretion and according to established judicial principles. As such, the plaintiff contended that the Deputy Registrar's reliance on the case of *Tang Hak Ju v. Ketua Menteri Negeri Pulau Pinang & Ors* ('*Tang Hak Ju*') was erroneous. It was submitted by the plaintiff that in the absence of any case law authority that related directly to the criteria for suspension of payment under the proviso to s. 33(3) of the

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GPA, the principles governing an application for a stay of application ought to apply *ie*, that the defendant must show that there are special circumstances to warrant suspension of the judgment debt and such circumstances must be deposed to in an affidavit by the defendant. The issues that arose for the court's determination were (i) whether it was proper to suspend a judgment debt against the defendant under the proviso to s. 33(3) of the GPA because there was an appeal by the defendant which was pending; and (ii) whether it was necessary for the defendant to show any special circumstances to warrant the exercise of the statutory discretion under the proviso.

Held (allowing plaintiff's appeal in encl. 61 with cost):

(1) A suspension of a judgment debt under the proviso to s. 33(3) of the GPA would mean that despite obtaining the requisite certificate under s. 33 of the GPA, the judgment creditor would not be able to take the appropriate next steps to realise the monies payable under the judgment debt. A suspension of a judgment debt would deprive the judgment creditor of the proverbial 'fruits of litigation'. Therefore, grant of an order of suspension was not automatic. It was to be granted only when the court was satisfied that there was a basis for the exercise of the statutory discretion under the proviso to suspend the judgment debt. (paras 30 & 31)

(2) The case of *Tang Hak Ju* provided no guidance as to the factors to be taken into account when considering an application under the proviso to s. 33(3) of the GPA. If s. 33(3) of the GPA was read as a whole, it was obvious that the true purpose of the proviso was to enable the defendant to seek the aid of the court to suspend any payment of the judgment debt which was pending appeal where it was necessary that pending disposal of the government's appeal, the judgment debt should not be paid to the judgment creditor. Another range would be the impecuniosity of the plaintiff and the resultant inability of the defendant to recoup and recover the amounts paid over to the plaintiff in the event the defendant's appeal was successful and restitution was ordered. (paras 32, 36 & 38)

(3) The reason advanced by the defendant for the suspension should be credible and not specious or contrived. It must be on affidavit and not asserted from the Bar. As such, if there was credible reason or basis to suspend the judgment debt then the court should generally lean in favour of exercising the statutory discretion under the proviso of s. 33(3) of the GPA to preclude the judgment creditor from taking any steps as may entitle them to realise the judgment sum. (paras 40 & 41)

(4) The proviso to s. 33(3) GPA is *sui generis* and is somewhat a specific statutory provision. As such, it should not be equated with the criteria necessary to obtain a stay of execution. However, if special

circumstances were shown, then the court should not refuse to grant a suspension of the judgment debt. In the present case, the application for suspension was made orally and there was no material whatsoever before the Deputy Registrar so as to enable him to form a view as to whether the statutory discretion should be exercised in favour of the defendant. (paras 45-47)

(5) The position *vis-a-vis* the proviso to s. 33(3) of the GPA was that the defendant must satisfy the court by an affidavit that there was some reason which warranted the suspension of the judgment debt. If nothing was shown to the court and reliance was placed on the mere fact that there was an appeal, then a suspension of the judgment debt pursuant to the proviso to s. 33(3) of the GPA would be erroneous or wrongful exercise of discretion. In the absence of any affidavit by the defendant to show a reason or basis for suspension of the judgment debt, the grant of suspension of the judgment debt by the Deputy Registrar on 28 April 2015 was erroneous and was hereby set aside. (para 51)

(6) An award for cost is a matter of discretion as provided in O. 59 r. 2(2) of the Rules of Court 2012. However, there must be a basis for depriving a successful party from his entitlement of cost. On the facts, there was no valid reason for depriving the plaintiff of cost in respect of encl. 55. (paras 53 & 54)

Case(s) referred to:

Hong Leong Bank Bhd v. Lee Khai Sin [2008] 7 CLJ 129 HC ***(refd)***
Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd [2003] 4 CLJ 1 FC ***(refd)***
Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd [2002] 3 CLJ 380 CA ***(refd)***
Tang Hak Ju v. Ketua Menteri Negeri Pulau Pinang & Ors [2010] 1 CLJ 993 CA ***(dist)***
Wong Sai Tack v. Chien Hon Keong [2000] 1 CLJ 195 HC ***(refd)***

Legislation referred to:

Government Proceedings Act 1956, ss. 30, 33(3)
Rules of Court 2012, O. 59 r. 2(2)

For the plaintiff - Sasha Ravindran; M/s Cheah Teh & Su
For the defendant - Mohd Sallehuddin Md Ali; FC

Reported by Sandra Gabriel

JUDGMENT

S Nantha Balan JC:

Introduction

[1] The issue that arises in this case is whether it is proper to suspend a judgment debt against the Government ("the defendant") under the proviso to s. 33(3) of the Government Proceedings Act 1956 ("s. 33(3) GPA") purely

because there is an appeal by the defendant which is pending or whether it is necessary for the defendant to show some reason or basis or circumstances to warrant the exercise of the statutory discretion under the proviso.

[2] Enclosure 61 is an appeal by the plaintiff against part of the decision of the learned Deputy Registrar given on 28 April 2015 in respect of the plaintiff's application (encl. 55) whereby it was ordered that:

(a) payment of the judgment debt be suspended pending the disposal of the appeals to the Court of Appeal against the judgment of the High Court dated 9 December 2014; and

(b) there be no order as to costs in respect of encl. 55.

[3] Enclosure 55 is the plaintiff's application for a certificate to be issued to the plaintiff under s. 33 of the Government Proceedings Act 1956 ("GPA") in respect of the judgment debt owed by the defendant pursuant to the judgment of the High Court dated 9 December 2014 ("the judgment" or "judgment debt").

[4] After considering submissions by both parties as to encl. 55, the learned Deputy Registrar on 28 April 2015 allowed the issuance of the certificate with the direction that the payment of the judgment debt be suspended pending the disposal of the appeals to the Court of Appeal against the judgment and further ordered that there be no order as to costs in respect of encl. 55.

[5] The judgment that was obtained by the plaintiff against the defendant on 9 December 2014 was for the sum of RM10,972,499.70 with interest at the rate of 5% per annum on the amount from 1 May 2009 until the date of full settlement and costs of RM15,000. The court had also ordered interest on costs at the rate of 5% per annum from 9 December 2014 until the date of full settlement.

[6] The defendant has appealed to the Court of Appeal against the judgment whereas the plaintiff has appealed against that part of the decision of the High Court which refused to allow an aspect of the plaintiff's claim against the defendant.

[7] For present purposes it is unnecessary to examine the claim and the judgment and as to what is being appealed by the plaintiff and defendant respectively as this appeal relates solely to the decision of the Deputy Registrar dated 28 April 2015 whereby he had allowed the plaintiff's application (encl. 55) for a certificate to be issued under s. 33(3) GPA but had also proceeded to exercise his discretion under the proviso to s. 33(3) GPA and suspended the whole of the amount payable under the judgment pending disposal of the appeals to the Court of Appeal by both parties. The Deputy Registrar also made no order as to costs in respect of the plaintiff's application (encl. 55).

[8] In this case, the defendant had not filed any affidavit in opposition to the plaintiff's application (encl. 55). The Deputy Registrar had apparently entertained an oral application by the Senior Federal Counsel (who appeared on behalf of the defendant) for suspension of the judgment debt. There was therefore no evidence whatsoever before the learned Deputy Registrar pertaining to the application for suspension of the judgment debt.

[9] By this appeal (encl. 61) the plaintiff seeks to reverse the relevant part of the decision of the Deputy Registrar dated 28 April 2015 and prays for an order that the suspension be set aside and for costs of encl. 55 to be allowed in favour of the plaintiff.

[10] The order for suspension of the judgment debt was made pursuant to the proviso to s. 33(3) GPA which provides as follows:

> (3) If the order provides for the payment of any money by way of damages or otherwise, or of any costs, the certificate shall state the amount so payable, and the appropriate Government shall, subject as hereinafter provided, pay to the person entitled or to his solicitor the amount appearing by the certificate to be due to him together with the interest, if any, lawfully due thereon:
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> *Provided that the court by which any such order as aforesaid is made or any court to which an appeal against the order lies may direct that, pending an appeal or otherwise, payment of the whole of any amount so payable, or any part thereof, shall be suspended, and if the certificate has not been issued may order any such directions to be inserted therein.*
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> (emphasis added)

[11] It was submitted for the plaintiff that the court's power to order suspension of payment under the proviso to s. 33(3) GPA is discretionary and that a court must exercise its discretion judiciously and according to established judicial principles.

[12] Apparently, in arriving at his decision to suspend the judgment debt, the learned Deputy Registrar relied on the Court of Appeal case of *Tang Hak Ju v. Ketua Menteri Negeri Pulau Pinang & Ors* [2010] 1 CLJ 993; [2010] 1 MLJ 319 ("*Tang Hak Ju*").

[13] In *Tang Hak Ju*, the exercise of the statutory discretion was illustrated as follows:

> [16] Section 33 of the GPA uses clear and unambiguous language. It is beyond dispute that a certificate under s. 33 of the GPA can be issued even when an appeal is still pending subject to the discretion of the court to direct that the payment of the whole or part of the judgment sum be suspended pending the appeal (see s. 33(3) proviso). In this case the deputy registrar has exercised that discretion by suspending payment of half of the judgment sum pending the appeal to the judge in chambers.

[14] The pertinent facts of *Tang Hak Ju* are as follows:

13.1 The plaintiff had commenced an action against the defendants for arbitrarily cancelling his title to a piece of land. On 4 October 2005, the court found in favour of the plaintiff and ordered damages to be assessed;

13.2 All appeal avenues against the judgment on liability had been exhausted;

13.3 On 21 September 2007, the Deputy Registrar assessed the damages at RM29,356,271;

13.4 On 25 September 2007, the defendants filed an appeal to the judge in chambers against the assessment;

13.5 On 5 October 2007, the defendants' application for a stay of execution was dismissed;

13.6 Despite repeated requests by the plaintiff, the defendants failed to make payment of the judgment sum. On 12 August 2008, the plaintiff applied under s. 33(3) GPA for a certificate to be issued. In issuing the certificate, the court ordered the suspension of half of the judgment sum;

13.7 Despite being served with the certificate, the defendants still failed to make payment of half of the judgment sum as required by the certificate;

13.8 The plaintiff then applied to court for an order of *mandamus* to compel the defendants to pay. The plaintiff's application was dismissed and the plaintiff appealed to the Court of Appeal.

[15] In the present case, the learned Deputy Registrar relied upon *Tang Hak Ju* and made the following findings or observations:

14.1 In *Tang Hak Ju*, the liability of the defendants were not in issue. The only issue was the quantum of damages assessed by the Deputy Registrar which was pending appeal to the judge in chambers;

14.2 It is on this basis that the High Court in *Tang Hak Ju* ordered payment of half of the judgment sum to be suspended pending the appeal to the judge in chambers; and

14.3 In the present case, the defendant's liability is still in issue as there are appeals pending in the Court of Appeal against the judgment.

[16] Counsel for the plaintiff submitted that the Deputy Registrar's findings and observations based on the case of *Tang Hak Ju* are erroneous for the following reasons:

15.1 *Tang Hak Ju* was an appeal against the decision of the High Court which dismissed the plaintiff's application for an order of *mandamus* to

compel the defendants to pay half of the judgment sum with interest as required by the certificate issued by the court;

15.2 Although the court had ordered the suspension of half of the judgment sum when it issued the certificate, the case does not state the factors that were taken into account or the principles that were applied by the court in ordering the suspension as this was not the issue on appeal;

15.3 Based on his findings, the Deputy Registrar has effectively held that the court will order suspension of the whole judgment sum in ALL cases where liability of the defendant is still in dispute; and

15.4 It was therefore submitted that the case of *Tang Hak Ju* does not support such a finding. It was emphasised that the court has a discretion under the proviso to s. 33(3) GPA to order the suspension of the whole or part of the judgment sum pending an appeal or otherwise, provided sufficient grounds are shown.

[17] Thus, it was submitted for the plaintiff that in the absence of any case law authority directly relating to the criteria for suspension of payment under the proviso to s. 33(3) GPA the principles governing an application for a stay of execution ought to apply - ie, the defendant must show special circumstances to warrant suspension of the judgment debt and such special circumstances must be deposed to in an affidavit. (See: *Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd* [2003] 4 CLJ 1 (FC) at pp. 17 - 19).

[18] Counsel for the plaintiff emphasised that the defendant did not file any affidavit in reply to the plaintiff's application under s. 33(3) GPA and there is not a shred of evidence before the court to show any special circumstances or any basis whatsoever so as to enable the court to exercise its discretion under the proviso to s. 33(3) GPA.

[19] The learned Federal Counsel maintained that the defendant did not file any affidavit in reply in respect of encl. 55 because the issue raised by the defendant is one of law ie, proviso to s. 33(3) of the GPA. He relied on the decision of the learned Abdul Malik Ishak J (as he then was) in the case of *Wong Sai Tack v. Chien Hon Keong* [2000] 1 CLJ 195; [2000] 5 MLJ 74 where it was held that there was no necessity to file an affidavit in reply as the whole matter revolved on a question of law.

[20] On the substantive issue, it was argued for the defendant that the special circumstances test does not apply to the proviso to s. 33(3) GPA. The defendant relied on the case of *Tang Hak Ju* where on the facts of that case, the court had dismissed an earlier application by the defendants for a stay of execution pending appeal to the judge in chambers but subsequently ordered the suspension of payment when the certificate was issued.

[21] It was submitted for the defendant that special circumstances would be relevant when the defendant applies for stay of execution pending appeal but not so when a suspension of the judgment debt is sought under the proviso to s. 33(3) GPA.

[22] In this regard, the learned Federal Counsel referred to s. 30 of the GPA which reads as:

> Appeals and stay of execution
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> 30. Subject to this Act, all written laws and rules of court relating to appeals and stay of execution shall, with the necessary modifications, apply to civil proceedings by or against the Government as they apply to proceedings between subjects.

[23] Thus, the learned Federal Counsel sought to invoke the Latin maxim *generalia specialibus non derogant* ("the general does not detract from the specific") and submitted that the proviso to s. 33(3) GPA is a specific statutory provision which caters for suspension of any obligation to pay a judgment debt which is pending appeal by the defendant and is separate and distinctly different from an application for stay of execution and that the width and sweep of the court's discretionary power cannot be curtailed by any requirement to show special circumstances which only arises under s. 30 of the GPA.

[24] In response counsel for the plaintiff argued that:

23.1 In *Tang Hak Ju*, the defendants' application for a stay of execution was dismissed on 5 October 2007. The plaintiff's application under s. 33(3) GPA for the certificate was made almost a year later on 12 August 2008;

23.2 The reasons for the dismissal of the stay application are not discernible from a reading of the case. However, it is safe to presume that the defendant had failed to show any special circumstances;

23.3 The case also does not state the factors that were taken into account when the court ordered the suspension. It is entirely possible that the defendant had at that juncture succeeded in adducing evidence to show that there are special circumstances warranting a suspension; and

23.4 The case of *Tang Hak Ju* is not an authority for the defendant's submission that the special circumstances test does not apply to s. 33(3) GPA.

[25] In seeking suspension of payment, the following points of law were made on behalf of the defendant:

24.1 Both parties had appealed to the Court of Appeal against the judgment and the appeals are pending;

24.2 The court has a discretion under the proviso to s. 33(3) GPA to order suspension when there is an appeal pending;

24.3 The proviso to s. 33(3) GPA is clearly applicable as decided in the case of *Tang Hak Ju*;

24.4 The plaintiff will not be prejudiced by the suspension as the judgment grants the plaintiff interest at the rate of 5% per annum on the judgment debt. The plaintiff is therefore compensated pending the appeals.

[26] For the plaintiff, it was submitted that the points raised by the Federal Counsel are irrelevant to the exercise of the court's discretion to suspend payment of the judgment debt. Counsel for the plaintiff advanced the following reasons in seeking to repudiate the points raised by learned Federal Counsel:

25.1 An appeal does not operate as a stay;

25.2 The case of *Tang Hak Ju* did not deal at all with the factors to be taken into account when the High Court exercises its discretion to order suspension of payment as this was not the issue on appeal;

25.3 The plaintiff had prayed for interest on the judgment sum pursuant to the Rules of Court 2012 which was allowed by this Honourable Court. The order on interest is part of the judgment debt and is not a form of "compensation". It is an amount that is rightfully due to the plaintiff under the judgment;

26.4 The plaintiff should not be deprived of the fruits of its litigation unless there are special circumstances that justify a stay of execution. (See: *Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd* [2002] 3 CLJ 380 at p. 402; [2002] 3 MLJ 49 (CA) at p. 67)

No Order As To Costs

[27] For the defendant, it submitted that the learned Deputy Registrar had lawfully exercised his discretion in deciding that there be no order as to costs in respect of encl. 55. This discretion is conferred by O. 59 r. 2(2) of the Rules of Court 2012 which provides as follows:

> (2) Subject to the express provisions of any written law and of these Rules, the costs of and incidental to proceedings in the Court, shall be in the discretion of the Court, and the Court shall have full power to determine by whom and to what extent the costs are to be paid.

[28] The principles with regard to this discretion can be distilled from the decision of the High Court in the case of *Hong Leong Bank Bhd v. Lee Khai Sin* [2008] 7 CLJ 129; [2007] 8 MLJ 246 where the following principles were restated:

> (a) The object of awarding costs to the litigant is to indemnify him for the expenses he had incurred in successfully establishing his legal rights. O. 59 of the RHC provides that costs of incidental proceedings in an action shall be in the discretion of the court. The court shall have full power to determine by whom and to what extent the costs are to be paid. The discretion of the court is very wide, but it has to be exercised judicially and on established principles.
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> (b) Because costs is in the discretion of the court, there has been a rule of practice of the House of Lord as stated by Viscount Cave LC in *Donald Campbell & Co Ltd v. Pollak*, that no appeal would lie for costs only, but the House will however entertain an appeal as to costs, where it is alleged that the order is founded upon an error of law.
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> (c) An appellate court does not interfere in the question of costs without reluctance. This is because the court below has an absolute discretion except that the discretion must be exercised judicially. An appellate court should only interfere unless it can be shown that there has been an error of law or the purported exercise of discretion was based on grounds wholly unconnected with the cause of action ...

[29] Based on the abovementioned principles, it was submitted for the defendant that there is no error of law committed by the learned Deputy Registrar in deciding that there be no order as to costs in respect of encl. 55. As such, it was submitted that the learned Deputy Registrar had lawfully exercised his discretion and such exercise of discretion should not be interfered with.

Conclusion

[30] In my view, the defendant is entitled to apply to the court for protection by way of an order for suspension of the judgment debt which is pending appeal. It is obvious enough that the proviso to s. 33(3) GPA can only be invoked when there is an appeal which is pending. However, the grant of an order for suspension is most certainly not and indeed cannot be automatic. Rather, it is to be granted only upon the court being satisfied that there is a basis for the exercise of the statutory discretion under the proviso to suspend the judgment debt.

[31] This bring us to the critical question: what are the criteria necessary for the exercise of the discretion under the proviso to s. 33(3) GPA. In this regard, it has to be borne in mind that a suspension of the judgment debt under the proviso to s. 33(3) GPA would mean that despite obtaining the

requisite certificate under s. 33 GPA, the judgment creditor will not be able to take the appropriate next steps to realise the monies payable under the judgment debt. In the result, a suspension of the judgment debt would deprive the judgment creditor of the proverbial "fruits of litigation".

[32] As for the applicability of the case of *Tang Hak Ju* I must say that I agree with the submissions made by counsel for the plaintiff in that the case provides no guidance as to what are the criteria or relevant factors to be taken into account when considering an application by the defendant under the proviso to s. 33(3) GPA for suspension of a judgment debt.

[33] Other than stating the obvious, ie, that there is a statutory discretion to allow suspension of the judgment debt, *Tang Hak Ju* is unhelpful as a case authority for present purposes. Hence, one would have to fall back on general principles to guide or inform the court as to the approach to be taken when dealing with an application for suspension of a judgment debt. The case law research undertaken by counsel for both sides has yielded no results and there is apparently no case law authority which sets out the necessary criteria for purposes of the proviso to s. 33(3) GPA.

[34] Before venturing any further, I shall deal with the point that was made by the learned Federal Counsel who stated that the proviso to s. 33(3) GPA is a special provision and is not to be equated with a stay of execution which falls under the general provision which is encapsulated by the omnibus provision in s. 30 of the GPA which was referred to in the earlier part of this judgment.

[35] In my view, the question as to whether the proviso to s. 33(3) GPA is a special provision only serves to obfuscate the true question which is to ascertain the purpose and function of the proviso. To my mind, the answer to the question is not so elusive or incapable of ascertainment.

[36] If s. 33(3) GPA is read as a whole then it will be implicitly obvious that the true purpose of the proviso is or must necessarily be to enable the defendant to seek the aid of the court to suspend any payment of the judgment debt which is pending appeal as there may or could be circumstances where it is necessary that pending disposal of the Government's appeal, the judgment debt should not be paid to the judgment creditor.

[37] In this regard, there may be a range of reasons or circumstances why a judgment debt against the defendant should be suspended. There could for instance, be public interest reasons or inter-governmental relationship or Federal/State Government relationships or arrangements that may be impacted and which would have to be considered.

[38] At the other extreme of this range would be the impecuniosity of the plaintiff and the resultant inability of the defendant to recoup and recover the amounts paid over to the plaintiff in the event the defendant's appeal is

successful and restitution is ordered. But this would be more akin to an argument that will usually be taken in the context of an application for stay of execution ("special circumstances").

[39] Needless to say, the categories are never closed and the list is by no means exhaustive. However, I have no doubt that whatever that is being advanced as a reason for the suspension, must necessarily have at least two attributes.

[40] First, the reason that is advanced by the defendant should be credible and not specious or contrived. Secondly, it must be on affidavit. Most certainly it should not be asserted from the Bar. Finally, it should not be "plucked from the air".

[41] As such, if there is a credible reason or basis to suspend the judgment debt then the court should generally lean in favour of exercising the statutory discretion under the proviso to s. 33(3) to preclude the judgment creditor from taking any steps as may entitle them to realise the judgment sum.

[42] I would go so far as to say that if there is any doubt on the matter and the evidence is resting in the middle, then the balance should tilt in favour of the defendant or the benefit of doubt be given to the defendant and for the judgment debt to be suspended accordingly.

[43] Of course, the circumstances may vary from case to case and it is tempting to conclude that the circumstance must amount to special circumstances of the type that is envisaged when a party is applying for stay of execution in the ordinary way.

[44] However, it appears to me that the proviso to s. 33(3) GPA is "*sui generis*" and is a somewhat specific statutory provision. As such, I should refrain from conflating and/or equating the criteria for suspension of a judgment debt under the proviso to s. 33(3) GPA with the criteria necessary to obtain a stay of execution.

[45] Whether the criteria to obtain a suspension of a judgment debt under the proviso to s. 33(3) GPA should be more or less stringent than the criteria for stay of execution is an open question. However, it is my view that at the very least, there should be some circumstances shown by the party seeking a suspension, which would qualify as a criteria under the proviso to s. 33(3) GPA.

[46] Of course, if special circumstances are shown, then I cannot see how a court can refuse to grant a suspension of the judgment debt. However, what is inescapable is that the applicant must show (on affidavit) some fact or circumstances or reason why the judgment debt should be suspended pending the disposal of the appeal.

[47] In the present case, the application for suspension was made orally and there was no material whatsoever before the learned Deputy Registrar so as to enable him to form a view one way or the other as to whether the statutory discretion should be exercised in favour of the defendant.

[48] The argument that was raised by learned Federal Counsel amounts to him saying that because there is an appeal which is pending, an affidavit is unnecessary and that the judgment debt should be suspended accordingly.

[49] Implicitly, Federal Counsel was articulating the position that suspension of the judgment debt would follow as soon as it is asked for, which means that all that the Government has to do is to ask for it (whether formally by application or orally) and it will be granted. Therein lies the fallacy of the argument.

[50] The view I take is that if that is the result that is envisaged then the proviso would have been worded very differently. Hence, if the argument made by Federal Counsel is taken literally and to its logical conclusion then it would render the discretion under the proviso redundant, as suspension will follow as a matter of course, if asked for. In the result, for the reasons discussed above, I am of the view that the argument that was made by the learned Federal Counsel is untenable.

[51] In my view, the position *vis-a-vis* the proviso to s. 33(3) GPA is that the defendant must satisfy the court (by affidavit) that there is some reason or basis or that there are circumstances which warrant the suspension of the judgment debt. If nothing is shown to the court and reliance is placed on the mere fact that there is an appeal, then a suspension of the judgment debt pursuant to the proviso to s. 33(3) GPA would in my view, be an erroneous or wrongful exercise of discretion.

[52] Having regard to all the facts in this case and in particular the absence of any affidavit by the Government of Malaysia to show a reason or basis for suspension of the judgment debt, I am impelled to the view that the grant of suspension of the judgment debt by the Deputy Registrar on 28 April 2015 was erroneous and is hereby set aside.

[53] As the plaintiff had succeeded in their application in encl. 55, there should have been an award of costs as costs would ordinarily follow the event. Of course, an award of costs is ultimately a matter of discretion as provided for in O. 59 r. 2(2) of the Rules of Court 2012. However, there must be a basis for depriving a successful party from his entitlement to costs.

[54] In the present case there was no valid reason for depriving the plaintiff of costs in respect of encl. 55. In all the circumstances, I am allowing the plaintiff's appeal (encl. 61). The Deputy Registrar's order/direction dated 28 April 2015 to suspend the judgment sum is hereby set aside. I am also allowing costs of RM1,000 for encl. 55. I further order costs of RM1,000 for the present appeal (encl. 61).

Order accordingly.